"No Creditors' Winding Up of International Business Companies Formed in Nevis"

Introduction

The recent decision of the High Court in Nevis in the matter of **Wang Ruiyun v. Gem Global Yield Fund Limited** (Claim No. NEVHCV2011/0067) delivered by Mister Justice Redhead on 11th November, 2011 emphatically states that there is no mechanism under Nevis law for a Creditor to wind up an international business company formed pursuant to the Nevis Business Corporation Ordinance 1984, as amended ("NBCO").

The Petition before the High Court in Nevis sought the winding up of a Nevis IBC by a judgment creditor which had obtained judgment against the IBC in the Hong Kong Courts. Efforts to conduct an oral examination of the directors of the company in Hong Kong proved futile as the directors were evading service. The Petitioner sued on the judgment debt in Nevis and obtained judgment in Nevis thereby converting the Hong Kong judgment to a Nevis judgment. Demands on the Company for payment proved futile. The debt was undisputed. The Judgment in Nevis had not been challenged and no payment had been made. The company had no known assets situate in Nevis. The issue then was solely one of enforcement and the Petitioner sought to wind up the Company and appoint liquidators on the basis that the Company was unable to pay its debts and or it was otherwise just and equitable for the Company to be wound up.

Jurisdiction

The jurisdiction of the Nevis High Court to order the winding up of a company incorporated under the provisions of the NBCO was the central question to be determined in the proceedings. The provisions as to winding up of a company incorporated under the NBCO are set out at Part XI of the NBCO. It was common ground between the parties that there were no express provisions contained therein permitting a creditors' winding up or a winding up by the Court on the grounds that it is just and equitable to do so. The NBCO is therefore silent on this point. This departs from the Nevis Companies Ordinance 1999 which expressly permits a creditors winding up for local companies registered thereunder.[1]

[1] In Nevis, international business companies are incorporated under the provisions of the NBCO while local companies are incorporated under the provisions of the Companies Ordinance, the difference being that local companies are permitted to conduct business in Nevis and subject to taxes on profits while international business companies are intended to conduct business outside Nevis and not liable to taxation in Nevis on their activities.

In light of this silence, the question arose as to whether the High Court had the jurisdiction to permit the Petitioner to wind up the Company.

Section 11 of the Eastern Caribbean Supreme Court (St. Kitts and Nevis) Act, Cap. 3.11 ("ECSC Act") provides an avenue for litigants to rely on in circumstances where legislation offers no assistance on a particular issue.[2] Specifically, Section 11(1) of the ECSC Act prescribes as follows:

> ***"The jurisdiction vested in the High Court in civil proceedings, and in Probate, Divorce and Matrimonial causes, shall be exercised in accordance with the provisions of this Act, or any other law in operation in the State and of the rules of Court; and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the procedure law and practice for the time being in force in the High Court of Justice in England."***

However, in a related judgment dated 22nd June, 2011 by Mister Justice Redhead, the Court made it clear that section 11 of the ECSC Act cannot ride in aid where the NBCO is silent as section 11 permits the importation of English procedural law only not English substantive law[3].

The Petitioner argued that the jurisdiction of the Court to import English substantive and procedural laws into Nevis to fill the lacuna was found in sections 7 and 11 of the ECSC Act. It was submitted that sections 7 and 11 when read together establish the necessary jurisdiction and the procedural rules governing that jurisdiction in permitting the Nevis Court to import English law and procedure in winding up the Company. The decision of the Court of 22nd June, 2011 did not address the issue of section 7 of the ECSC Act at all.

Section 7 of the ECSC Act states:

> ***"The High Court shall have and exercise within the State the same jurisdiction and the same powers and authorities incidental to such jurisdiction as may from time to time be vested in the High Court of Justice in England".***

The Petitioner argued that section 7 contains a number of propositions:

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[2] See **Nigel Hamilton Smith, Peter Wastell (Joint Liquidators) v. Alexander M. Fundora** (HCVAP2010/031 Court of Appeal (Antigua) **TAB 3**

[3] Citing **Panacom International Incorporated v. Sunset Investments Ltd.** (Civil Appeal No. 14 of 1992 St. Vincent and the Grenadines); **Hugh Marshall v. Antigua Aggregates Labour Limited** (Civil Appeal No. 23 of 1999 Antigua and Barbuda) **TABS 5, 6**

i. the Nevis Court shall have and exercise within Nevis the **same jurisdiction** as may from time to time be vested in the High Court of Justice in England.

ii. the Nevis Court shall have and exercise within Nevis **the same powers and authorities incidental to such jurisdiction** as may from time to time be vested in the High Court of Justice in England.

iii. such jurisdiction and incidental powers and authorities are the same **as may from time to time be vested in the High Court of Justice in England**.

The Petitioner submitted to the Court that the jurisdiction vested by section 7 of the ECSC Act is therefore what is vested in the English High Court from ***"time to time".*** It therefore follows that the jurisdiction vested in the Nevis High Court is the identical jurisdiction that is currently vested in the English High Court. Section 7 of the ECSC Act contains no limitation as to time when the jurisdiction of the English High Court can ride in aid to determine the current jurisdiction of the High Court in Nevis. Section 7 is also not dependent on the origins of the jurisdiction of the English High Court. Whether that jurisdiction flows from statute or rules of procedure or custom or the inherent jurisdiction of the Court, section 7 makes it clear that the same jurisdiction as applies in the English High Court applies *mutatis mutandis* in the Nevis High Court. Put differently, the Nevis High Court can import such jurisdiction as the English High Court may have from time to time in dealing with any matter which arises before the Nevis High Court and on which the laws of Nevis whether substantive or procedural may be silent.

Inasmuch as it was clear that the English High Court did have the jurisdiction to wind up a company on a creditors application on the basis that the company was unable to pay its debts or on just and equitable grounds, the Petitioner argued that the Nevis High Court could import such jurisdiction into Nevis pursuant to section 7 of the ECSC Act[4].

The Petitioner accepted that the importation of English substantive law appeared incompatible with the Sovereign nature of St. Kitts and Nevis but submitted that that argument fell away inasmuch as the Legislature of St. Kitts and Nevis had specifically enacted the provisions of the ECSC Act and must therefore have had a clear intention to import English law both as to substance and as to procedure to fill any lacuna in the local law. There appeared no reasonable explanation why section 11

[4] See sections 117 and 122 of the English Insolvency Act 1986

of the ECSC Act was judicially accepted as permitting the importation of English procedural laws made by rules committees or promulgated as subsidiary legislation in England under the terms of a principal Act there[5] but the terms of the principal Act itself could not be imported under section 7 of the ECSC Act. That approach, the Petitioner contended, would lead to the curious result where the subsidiary legislation could be imported into Nevis to fill a lacuna in our procedure but the parent legislation could not be imported to fill a lacuna in our substantive law.

It was also submitted that in light of the interpretation of section 11 of the ECSC Act that it permits the importation only of procedural law, then section 7 admits of and indeed demands a wider interpretation to admit the importation of English substantive law. Were it not so, there would be no need for both sections 7 and 11 in the ECSC Act as the one or the other would be otherwise superfluous. The use of the words "*jurisdiction*", "*powers*" and "*authorities*" in section 7 clearly speak to the jurisdiction, powers and authority to make decisions on the basis of both substantive and procedural laws.

It would also seem a wholly unsatisfactory result if the Company, which is undoubtedly subject to the jurisdiction of the Nevis Court, could refuse to pay its debts as found to be due both by a Court of competent jurisdiction in Hong Kong and by the Nevis Court and yet continue in operation in Nevis without let or hinder while its legitimate creditors are locked out. That result cannot be just or equitable and cannot have been intended by the framers of the NBCO. Parliament could not have intended that the provisions of the NBCO would be used to work a manifest injustice, and arguably a fraud, on a bona fide creditor of the Company.

The Petitioner also argued that a wide ambit for section 7 is buttressed when regard is had to section 7(2) of the ECSC Act which gives to the Nevis High Court in relation to the custody of the persons and estates of idiots, lunatics and persons of unsound mind ***"all such jurisdiction as is vested in England in the Lord Chancellor or other person or persons entrusted by her Majesty with the care and commitment of such persons and estates".*** The Petitioner posited that this was a clear statement by the legislature of St Kitts and Nevis that the importation of English substantive law was permissible. There was therefore no juridical or constitutional heresy in importing both substantive and procedural English law into Nevis to ensure that the Nevis High Court is never rendered without jurisdiction in relation to any litigant or dispute properly before it.

Against the arguments of the Petitioner were 2 decisions from the British Virgin Islands which are of some interest.

[5] See footnote 2 above

The first is **Ocean Conversion (BVI) Limited v. Attorney General of the Virgin Islands**[6]. That case concerned the question of the Court's jurisdiction to award pre judgment interest. It was accepted that there was no statute in the BVI permitting an award of pre judgment interest. However, the English Law Reform (Miscellaneous Provisions) Act 1934 permitted such an award. The Claimant sought to rely on section 7 of the West Indies Associated States Supreme Court (Virgin Islands) Act (Cap 80) to import the provisions of the Law Reform (Miscellaneous Provisions) Act 1934. Section 7 provided:

> *"The High Court shall have and exercise within the Territory all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940 were vested in the High Court of Justice in England".*

Bannister J reasoned thus:

> *"If this submission were correct, it would mean that every statute in force in England at the beginning of 1940 and which gave the High Court in England power to make orders of any sort (on divorce, for example, or as to the control of rents) would have effect in the Territory by a sidewind. In my judgment the submission is misconceived. Section 7 of the Act deals with (a) jurisdiction and (b) powers and authorities incidental to jurisdiction. The basic meaning of jurisdiction in this context is the power to decide matters. Thus, the High Court in England in 1940 had, in relation to persons subject to it, unlimited jurisdiction (in contrast to the Country Courts for example ...). This basic jurisdiction may be conferred by Statute (section 7 of the Act is a good example of this being done) but once conferred and subject to any limitations contained in the provision conferring it, it does not depend upon any further statutory authority for its exercise. The High Court in England also had in 1940 (and still has) a so called inherent jurisdiction. Familiar examples are the power to regulate its own processes, to stay proceedings, to restrain abuses and (in 1940) to punish contempts of Court. This use of the word jurisdiction is slightly different from the basic meaning, but the essential feature is that its exercise, like that of the basic jurisdiction, is independent of statute: see* ***Davey v. Bentick****. When section 7 refers to powers and authorities incidental to such jurisdiction, it is referring in my judgment, to the inherent jurisdiction. It is not referring to specific powers conferred on the High Court under particular English statutes. Such specific powers are*

[6] BVIHCV2009/0192 Bannister, J.

not vested in the High Court of Justice in England. They are made available to it by legislation passed for the purpose".[7]

The second case is **Pasig Ltd. Et al v. RWC et al.**[8] This case involved the question of service out of the jurisdiction without permission in the context of the Trustee Ordinance (Cap 303). It was submitted to the Court that where there was a lacuna in the Courts procedural weaponry, it had an inherent power to fill in order to permit it to dispense justice in the proceedings before it.[9]

Bannister J held:

"While I undoubtedly have power to fill procedural gaps in cases where I already have jurisdiction, in my judgment I have no inherent power to confer jurisdiction upon myself in the first place".[10]

Counsel in **Pasig Ltd** also relied on section 11 of the Supreme Court Act in the BVI (*mutatis mutandis* the same as the ECSC Act). Bannister J ruled that section 11 was concerned with the *"exercise of jurisdiction"*. His Lordship continued:

"The nature of the jurisdiction is defined in section 7"[11]

Having cited section 7 of the BVI Supreme Court Act[12] Bannister, J stated:

"What section 11 does is to enable me to look to the law and practice of the High Court in England in the course of exercising the jurisdiction conferred by section 7, by subsequent legislation and by rules made by the proper authority ....Section 11 does not permit me to import rules from England in order to confer upon myself an extra-territorial jurisdiction which I do not already have. It only enables me to draw on English law and procedure in cases where I am exercising a jurisdiction which I do have".[13]

The Petitioner submitted to the Nevis Court that Bannister J's decision in **Ocean Conversion (BVI) Limited** was wrong in principle and seems to be contradicted by his subsequent statements in **Pasig Ltd** as to the scope of section 7 of the BVI Supreme Court Act. The decision of Bannister, J did not bind the Nevis Court and the

[7] Para 16 of Judgment
[8] Claim No. BVIHC (Com) 24 of 2010, Bannister, J.
[9] Para 21 of Judgment
[10] Para 22 of Judgment
[11] Paragraph 24 of Judgment
[12] Set out at paragraph 24 of these submissions
[13] Paragraph 25 of Judgment.

persuasiveness of the authority in **Ocean Conversion (BVI) Limited** was dampened considerably in light of the following:

i. the Learned Judge's interpretation of section 7 renders that section entirely superfluous and otiose. There would be no need for the BVI Supreme Court Act (formerly the West Indies Associates States Supreme Court (Virgin Islands) Act) to make any reference to the jurisdiction vested in the English High Court unless it wished to import such jurisdiction into the BVI.

ii. the learned Judge was clearly wrong to suggest that the use of section 7 would permit *"every statute in force in England at the beginning of 1940"* having effect in the BVI *"by a sidewind"*. A proper reading of section 7 could only mean that it rides in aid when the law in the BVI setting out the permissible jurisdiction of the High Court is silent. Put differently, it is not every statute in England which would take effect in the BVI but only such statutes as were necessary to give the BVI Court the same jurisdiction as the English Court as at 1940[14] and this was far from a sidewind. It was and is the legislative intent of the framers of the BVI Supreme Court Act.

iii. the learned Judge was also wrong when he sought to define the powers and authorities incidental to such jurisdiction as meaning merely the inherent jurisdiction of the Court. The law is clear that the inherent jurisdiction of the Court does not depend on any statement in Statute or otherwise. It is a power which is inherent to the High Court by its nature as a High Court and would exist regardless of section 7. Where therefore section 7 speaks to powers and authorities incidental to such jurisdiction, it cannot be meant to be speaking of the inherent jurisdiction of the Court. In **Millennium Financial Limited v. Thomas McNamara et al**[15] the Court of Appeal held that *"the High Court of the Federation of Saint Christopher and Nevis is the repository of all the powers referred to as the "inherent jurisdiction" possessed by the common law courts of England"*[16].

iv. the learned Judge later in **Pasig Ltd.** confirms that section 7 defines the nature of his jurisdiction and that jurisdiction is conferred by section 7. These pronouncements in **Pasig Ltd** appear at odds with the statements made in **Ocean Conversion (BVI) Limited** decided 8

[14] We note that section 7 of the ECSC Act has no limitation as to date as the BVI does
[15] Civil Appeal HCVAP 2008/012 St. Kitts and Nevis
[16] Paragraph 23 of Judgment

months earlier. It is instructive that **Ocean Conversion (BVI) Limited** was not cited to nor relied upon by the learned Judge in **Pasig Ltd**.

The Petitioner accordingly invited the Nevis Court to apply its mind afresh to the proper scope of section 7 of the ECSC Act and to do so especially in light of the recent by the recent decision of the full Court of Appeal in **A, B, C & D v. E**[17] delivered on September 19th, 2011 where the Court of Appeal in the context of the development of the Norwich Pharmacal jurisdiction in the Eastern Caribbean Supreme Court stated:

> "*Neither the Supreme Court Act nor the Civil Procedure Rules 2000 made thereunder, specifically address this type of order... The grant of Norwich Pharmacal relief is now very much part and parcel of the legal landscape of this Court's jurisdiction ... This is no doubt so because the Court is charged with exercising the same equitable jurisdiction as the English courts of similar standing. Furthermore the Supreme Court Act (enacted in all member States and Territories) contains two provisions (one in relation to the High Court, the other in relation to the Court of Appeal) which, in essence, say this:*
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> *"The jurisdiction vested in the Court in civil proceedings shall be exercised in accordance with the Act [the Supreme Court Act], rules of court and any other law in force in the State* ***and where no special provision if therein contained, such jurisdiction shall be exercised as nearly as may be administered for the time being in the Courts [High Court and Court of Appeal] in England.*** *(My Emphasis)"*[18]

The Respondent argued that there was no lacuna in the law of Nevis and that the legislature in Nevis had obviously made a deliberate decision to exclude a creditors' winding up or a winding up on just and equitable grounds by its omission of such provisions from Part XI of the NBCO. In any event, the Respondent argued that section 7 of the ECSC Act could not have the meaning contended for by the Petitioner and would open the floodgates where practitioners in Nevis would have to advise clients not only on what the law in Nevis said but also on what the law in England may be from time to time.

The Decision

[17] Civil Appeal 2011/001 Anguilla

[18] This was the learned Justice of Appeal's emphasis not ours.

After consideration of the competing positions, Mister Justice Redhead made it clear that section 7 of the ECSC Act could not be given the meaning contended for by the Petitioner and ruled that what is called for is a *"strict interpretation of section 7 of the ECSC"* Act.[19] The learned Judge also ruled that where the independent legislature of St. Kitts and Nevis has enacted legislation similar to legislation in the United Kingdom and the St. Kitts and Nevis legislation does not contain a particular provision contained in the UK legislation then the silence of the local legislation should not be seen as a lacuna[20].

Redhead, J continued:

> *"In my considered opinion the word "jurisdiction" here means the ability/authority to try certain matters. It cannot mean more or less. In other words section 7 means, in my opinion, that the Nevis Court shall have and exercise within the state of Nevis the same authority and powers incidental to such jurisdiction as may from time to time be vested in the High Court of Justice in England".*[21]

His Lordship rejected the argument that there was a lacuna in the NBCO because there was no provision made therein for the winding up of a company by a creditor when the company is insolvent as is provided for in the English and other legislation such as the British Virgin Islands.[22]

The learned Judge was "*sympathetic"* to the arguments of the Petitioner that the importation of procedural rules under the Insolvency Act of England was permissible but not the substantive provisions of the Act itself appeared anomalous but suggested that the answer was obvious and that as an independent country, St. Kitts and Nevis' Constitution vested sole authority in the legislature of St. Kitts and Nevis to pass laws for the peace, order and good governance of the country.[23]

His Lordship was also *"sympathetic"* to the plight of an innocent bona fide creditor being locked out from winding up an international business company in Nevis and the obvious injustice that that may cause to such a creditor but opined that:

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[19] Paragraph 26 of Judgment

[20] "I would have thought that the legislature of the OECS territories had gone past that stage". Paragraphs 27/28

[21] Paragraph 30

[22] Paragraph 35

[23] Paragraph 36. It is perhaps regrettable that the learned Judge did not opine on the fact that the ECSC Act including sections 7 and 11 was an Act passed by the same independent legislature of St. Kitts and Nevis which must therefore have intended in the exercise of its constitutional powers to legislate for the peace, order and good government of the country, to include the provisions of sections 7 and 11 of the ECSC Act and their reference to the English Court's jurisdiction and procedure.

"that is a situation which can be corrected only by the legislature of St. Kitts and Nevis"[24]

Conclusion

The decision in **Wang Ruiyun** is clear that a creditors winding up of an international business company is not possible on the present state of the law in Nevis. It is a matter of some regret that the Petitioner was forced to resort to the importation of English law through the perceived portal of section 7 of the ECSC Act. It is a matter of even greater regret that a legitimate creditor can be locked out and an unscrupulous company can be protected on the state of the law as enunciated by the learned Judge.

It is not at all obvious how the OECS Courts including the Court of Appeal have been willing to accept that section 11 of the ECSC Act which is reflected in similar terms throughout the OECS region can permit the importation of English procedural rules but not English substantive law. In **Wang Ruiyun** for example, the Court accepted that English insolvency rules could be imported but not the principal Act under which those rules are promulgated. It would seem that the arguments as to independence and sovereignty of OECS parliaments, if they are to have any rigour at all, must extend not just to an injunction on the importation of English substantive law but to an importation of English procedural law as well. This curious position has yet to be adequately explained.

In the meantime, the unfortunate position remains. There appears no recourse for creditors in winding up a Nevis international business company for non payment of its debts. We now have little choice but to wait on the Nevis Island Assembly to correct this anomaly and to hope that it acts with alacrity to do so.

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[24] Paragraph 37.